

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

FLEMING	:	CIVIL ACTION
	:	
v.	:	
	:	NO.02-2703
KRAMON EMPLOYER	:	
ROYCE REALTY, INC., et al.	:	

MEMORANDUM

Baylson, J.

August 16, 2002

Plaintiff's Complaint seeks damages and other relief arising out of Defendants' alleged employment discrimination based on race and gender/sex and retaliation for engaging in protected acts. Plaintiff seeks recovery in Count I for race and sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), Count II for race and sex discrimination in violation of the Pennsylvania Human Relations Act, 43 P.S. § 951 *et seq.* ("PHRA"), Count III for retaliation in violation of Title VII and the PHRA, Count III-A for intentional infliction of emotional distress, Count IV for aiding and abetting employment discrimination (against Defendant Ahle), and Count V for aiding and abetting employment discrimination (against Defendant Kochman).¹

Defendants move only to dismiss Plaintiff's claims for sex discrimination, retaliation and intentional infliction of emotional distress pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendants do not move to dismiss Plaintiff's claims for race discrimination and aiding and abetting employment discrimination (against Defendants Ahle and Kochman). Defendants'

¹The counts of Plaintiff's Complaint have been renumbered based on the explanation provided in Plaintiff's Response to Defendants' Motion to Dismiss. (Mem. Opp'n Mot. Dismiss at n.1.)

Motion will be granted.

I. Legal Standard

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1251, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angela v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

II. Facts

Wanda M. Fleming, an African-American female ("Plaintiff"), was employed by Kramont Employer Royce Realty d/b/a Kramont Realty Trust ("Kramont") first as a receptionist and then as an administrative assistant from April 1998 until she was terminated by Kramont on January 30, 2001. (Compl. ¶¶ 23-29, 46.) Plaintiff's direct supervisor was John R. Ahle, Jr. ("Ahle") and one of Plaintiff's managers was Edward Kochman ("Kochman"). Id. ¶¶ 28, 32.

Immediately upon taking direct supervisory control over Plaintiff, Ahle allegedly embarked upon a settled plan the ultimate goal of which was to cause the termination of Plaintiff. Id. ¶ 33. Ahle's plan allegedly included harassing Plaintiff, depriving Plaintiff of necessary information to perform her job, excluding Plaintiff from essential meetings, ostracizing Plaintiff, and publicly chastising and criticizing Plaintiff for failing to integrate and act upon information of which she had been improperly deprived. Id. ¶ 33. Ahle allegedly was planning to replace

Plaintiff with his former secretary, Christine Kempf, a white female, who was also under the direct supervision of Ahle. Id. ¶¶ 34-35. Plaintiff asserts that Ahle treated Ms. Kempf differently and more favorably than Plaintiff and other white employees. Id. ¶¶ 36-39. Plaintiff further alleges that she did not receive a promised raise and that her request for a raise was not afforded “Committee Review”, which was regularly afforded to requests for raises by white employees. Id. ¶¶ 41-43.

After Plaintiff was discharged on January 30, 2001, Plaintiff filed an administrative complaint with the Equal Employment Opportunity Commission (“EEOC”) and, subsequently, filed the instant action on May 6, 2002.

III. Discussion

A. Sex Discrimination and Retaliation

Defendants move to dismiss Plaintiff’s claims for sex discrimination and retaliation due to Plaintiff’s alleged failure to exhaust the administrative remedies by not asserting sex discrimination and retaliation in her administrative complaint filed with the EEOC and the Pennsylvania Human Relations Commission (“PHRC”). (Mem. Supp. Mot. Dismiss at 8.) Plaintiff concedes that she only checked the “race” box in the section titled “cause of discrimination based on” and not the “sex” and “retaliation” boxes. (Mem. Opp’n. Mot. Dismiss at 5.)

Before bringing a suit in a federal court alleging violations of Title VII and the PHRA, it is well-settled that a plaintiff must exhaust the administrative remedies by first filing a charge

with the appropriate agency. ² Ivory v. RadioOne, Inc., 2002 U.S. Dist. LEXIS 5672, *4 (E.D. Pa. Apr. 3, 2002). “Once a discrimination claim has been filed, the scope of a judicial complaint is not limited to the four corners of the administrative charge.” Duffy v. Massinari, 202 F.R.D. 437, 441 (E.D. Pa. 2001). The judicial complaint, however, is “limited by the charge filed with the EEOC and the investigation which can reasonably be expected to grow out of that charge.” Fugarinov. Univ. Servs., 123 F. Supp. 2d 838 (E.D. Pa. 2000) (quoting Redding v. Hosp. Cent. Servs., Inc., 4 F. Supp. 2d 405, 409 (E.D. Pa. 1998)).

The appropriate test for whether a plaintiff has failed to exhaust the administrative remedies is not whether the judicial complaint mirrors the plaintiff’s earlier administrative complaint, but rather “whether the acts alleged in the subsequent... suit are fairly within the scope of the prior EEOC complaint, or the EEOC investigation arising therefrom.” Antol v. Perry, 82 F.3d 1291, 1295 (3d Cir. 1996) (quoting Walters v. Parsons, 729 F.2d 233, 237 (3d Cir. 1984)). “The legal analysis for whether a judicial complaint is within the scope of an earlier administrative charge or a reasonable investigation therefrom turns on ‘whether there is a close nexus between the facts supporting each claim or whether additional charges made in the judicial complaint may fairly be considered explanations of the original charge or growing out of it.’” Ivory, 2002 U.S. Dist. LEXIS 5672, *6-7 (quoting Fakete v. Aetna Inc., 152 F. Supp. 2d 722, 732 (E.D. Pa. 2001)). “In determining whether a judicial complaint is sufficiently related to an

² A person claiming discrimination in violation of Title VII must file a federal charge with the EEOC prior to bringing a suit in federal court. Ivory v. RadioOne, Inc., 2002 U.S. Dist. LEXIS 5672, *5 n.1 (E.D. Pa. Apr. 3, 2002) (citations omitted). Similarly, the PHRA provides that a person claiming discrimination must file a verified complaint with the PHRC before a discrimination suit may be maintained in court. Id. The analysis of whether a plaintiff has failed to exhaust these administrative procedures is identical under Title VII and the PHRA. Id.

administrative charge, the most important consideration is the factual statement.” Ivory, 2002 U.S. Dist. LEXIS 5672, *7 (citing Doe v. Kohn Nast & Graf, P.C., 866 F. Supp. 190, 196 (E.D. Pa. 1994)).

1. Sex Discrimination

In Mullen v. Topper’s Salon and Healthcare Spa, Inc., 99 F. Supp. 2d 553 (E.D. Pa. 2000), the court held that the plaintiff failed to exhaust the administrative remedies with respect to her sex discrimination claim because it was not within the scope of the plaintiff’s EEOC complaint, which only alleged religious discrimination. The court based its decision on the following findings: only the “religion” box in the section titled “cause of discrimination based on” was checked; the factual allegations in the charge of discrimination consistently referred to harassment attributable to her “moral convictions and beliefs”; and the final statement on her charge read, “I believe I have been discriminated against because of my religion, Christian, in violation of Title VII of the Civil Rights Act of 1964, as amended.” Id. at 556.

In the present action, Plaintiff concedes that she only checked the “race” box in the section titled “cause of discrimination based on” and Plaintiff states in her charge, “I believe that I have been discriminated against because of my race (Black) in violation of Title VII of the Civil Rights Act of 1964, as amended.” (Mem. Supp. Mot. Dismiss at Ex. B.) In addition, there are no factual allegations in the administrative complaint of sex discrimination or hostile work environment based on Plaintiff’s sex. Plaintiff did not distinguish her case from Mullen or cite to any case to the contrary. Accordingly, Plaintiff’s sex discrimination claim is not fairly within the scope of the EEOC charge and that claim will be dismissed.

2. Retaliation

In Watson v. Southeastern Pa. Transit Auth., 1997 U.S. Dist. LEXIS 13306 (E.D. Pa. Aug. 28, 1997), aff'd on other grounds, 207 F.3d 207 (3d Cir. 2000), cert. denied, 531 U.S. 1147, 121 S.Ct. 1086, 148 L.Ed.2d 961 (2001), the court dismissed the plaintiff's retaliation claim because retaliation was not alleged in the EEOC charge and the EEOC charge did not contain any allegations that the plaintiff had complained about the discrimination. The court found that plaintiff's federal court complaint alleged retaliation after she complained about gender and disability discrimination even though the plaintiff's EEOC charge referred only to complaints concerning her pain in performing certain jobs. See id. at *21. The court, therefore, held that the claims of retaliation were not within the scope of the EEOC charge nor did it arise out of the EEOC investigation and the claims of retaliation were dismissed. See id.

In distinguishing its case from Watson, the court in Ivory held that the facts alleged in the plaintiff's administrative complaint were sufficient for the court to find that a retaliation claim was a natural outgrowth of the plaintiff's administrative complaint because it clearly indicated that she had complained to management about the abusive work environment and the discriminatory behavior of her co-worker. 2002 U.S. Dist. LEXIS 5672, *7-8. Similarly, in Mullen, the court held that, although plaintiff did not allege retaliation in her administrative complaint, the retaliation claim was within the scope of her administrative complaint because plaintiff's administrative complaint contained allegations that the plaintiff had complained about the discrimination on numerous occasions. See Mullen, 99 F.Supp.2d at 556 & n.6.

The present case is similar to Watson and distinguishable from both Ivory and Mullen, because Plaintiff's administrative complaint is devoid of any allegation that she complained to

management about the alleged discriminatory behavior of Ahle. (Mem. Supp. Mot. Dismiss at Ex. B.) The court, therefore, cannot find that Plaintiff's retaliation claim is fairly within the scope of the EEOC charge or the investigation therefrom. Accordingly, Plaintiff's retaliation claim will be dismissed.

B. Intentional Infliction of Emotional Distress

Defendants argue that Plaintiff's claim for intentional infliction of emotional distress should be dismissed because Plaintiff has not set forth the facts under which she could recover for that claim (Mem. Supp. Mot. Dismiss at 4), and because Plaintiff's claim for intentional infliction of emotional distress is barred by the exclusivity provisions of the Pennsylvania Workers' Compensation Act, P. A. STAT. ANN. tit. 77 § 1 *et seq.* (2002) ("PWCA"). *Id.* at 7.

1. Extreme and Outrageous Conduct

Defendants argue that Plaintiff's claim for intentional infliction of emotional distress must be dismissed because the conduct alleged does not rise to the level required to state a claim under Pennsylvania law. *Id.* at 4.

In order to state a claim for intentional infliction of emotional distress in Pennsylvania, the plaintiff must establish four elements: (1) the conduct of the defendant must be intentional or reckless; (2) the conduct must be extreme and outrageous conduct; (3) the conduct must cause emotional distress; and (4) the distress must be severe. See Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1273 (3d Cir. 1979); Hitchens v. County of Montgomery, 2002 U.S. Dist. LEXIS 2050, *27-28 (E.D. Pa. Feb. 11, 2002). For a plaintiff to recover on an intentional infliction of emotional distress claim, "the conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as

atrocious, and utterly intolerable in a civilized society.” Cox v. Keystone Carbon Co., 861 F.2d 390, 395 (3d Cir. 1998) (quoting Buczek v. First Nat’l Bank of Mifflintown, 531 A.2d 1122, 1125 (Pa. Super. Ct. 1987)); Imboden v. Chowns Communications, 182 F. Supp. 2d 453, 457 (E.D. Pa. 2002).

The Third Circuit and courts of the Commonwealth of Pennsylvania have stated “it is extremely rare to find conduct in the employment context that will give rise to the level of outrageousness necessary to provide a basis for recovery of the tort of intentional infliction of emotional distress.” Id.; DeWyerv. Temple Univ., 2001 U.S. Dist. LEXIS 1141, at *15 (E.D. Pa. Feb. 6, 2001). It has been noted that “the only instances in which courts applying Pennsylvania law have found conduct outrageous in the employment context is where an employer engaged in both sexual harassment and other retaliatory behavior against an employee.” Imboden, 182 F. Supp. 2d at 457 (quoting Cox, 861 F.2d at 395). In addition, courts have held that the extra factor that is generally required for sexual harassment tort is to the level of outrageousness necessary to make out a cause of action for intentional infliction of emotional distress is retaliation for turning down sexual propositions. See id. (citing Andrews v. City of Philadelphia, 85 F.2d 1469, 1487 (3d Cir. 1990)).

In Imboden, the plaintiff alleged retaliation for complaining about sexual discrimination. 182 F. Supp. 2d at 457-58. The court dismissed plaintiff’s claim for intentional infliction of emotional distress because the retaliation plaintiff alleged was not based on sexual advances or propositions, which the court held is the type of retaliation required to maintain a cause of action for intentional infliction of emotional distress. Id. at 457-58.

In the present action, Plaintiff alleges hostile work environment based upon race and sex

and retaliation for informing her employer of the adverse treatment by Ahle and of the raise that she was allegedly promised and never received. (Compl. at ¶¶ 62-63, 67-68, 72-74.) Although Plaintiff alleges sexual harassment, the retaliation alleged by Plaintiff is not based on rejection of sexual advances or propositions, which is required for the alleged conduct to rise to the level of outrageousness necessary to maintain a claim for intentional infliction of emotional distress. Accordingly, the Complaint fails to state a cause of action for intentional infliction of emotional distress and that claim will be dismissed.

2. PWCA

Plaintiff's claim for intentional infliction of emotional distress should also be dismissed because it is barred by the exclusivity provisions of the PWCA. The PWCA provides that "[t]he liability of an employer under this act shall be exclusive and in place of any and all other liability to such employees...in any action at law or otherwise on account of any injury or death as defined in [P A. STAT. ANN. tit. 77 § 411] or occupational disease as defined in [P A. STAT. ANN. tit. 77 § 27.1]." P A. STAT. ANN. tit. 77 § 481(a). The PWCA, however, carves out an exception, often referred to as the "personal animus" or "third-party attack" exception, for employee injuries caused by the intentional conduct of third parties for reasons unrelated to an employee's employment. See DeWyer, 2001 U.S. Dist. LEXIS 1141, at *12. The third-party attack exception in the PWCA states:

the term "injury arising in the course of his employment"...shall not include an injury caused by the act of a third person intended to injure the employee because of reasons personal to him, and not directed against him as an employee or because of his employment.

PA. STAT. ANN. tit. 77 § 411(1).

Federal courts have consistently held that the PWCA is the exclusive remedy against an employer where a claim for intentional infliction of emotional distress is based upon discriminatory conduct and courts have applied the third-party attack exception in very limited circumstances. Taylor v. City of Philadelphia, 2001 U.S. Dist. LEXIS 17380, *2-3 (E.D. Pa. Sept. 24, 2001); DeWyer, 2001 U.S. Dist. LEXIS 1141, at *13. Courts in the Eastern District of Pennsylvania have noted:

[T]he critical inquiry in determining the applicability of the third-party attack exception is whether the attack was motivated by personal reasons, as opposed to generalized contempt or hatred, and as sufficiently unrelated to the work situation so as not to arise out of the employment relationship.

Fugarinov v. Univ. Servs., 123 F. Supp. 2d 838, 844 (E.D. Pa. 2000); see also DeWyer, 2001 U.S. Dist. LEXIS 1141, at *14.

In DeWyer, the court stated that the discrimination the plaintiff alleged manifested in behavior displayed only at the workplace—reprimands, suspensions, criticisms, and requiring the plaintiff to park other than where she desired—and, therefore, was entirely related to the work situation and arose solely from the employment relationship. DeWyer, 2001 U.S. Dist. LEXIS 1141, at *14. Consequently, the court held that the third-party attack exception would not apply and the PWCA would bar a claim for intentional infliction of emotional distress. Id.

In this present action, Plaintiff alleges that Ahle harassed Plaintiff, deprived Plaintiff of necessary information to perform her job, excluded Plaintiff from essential meetings, ostracized Plaintiff in other ways, chastised and criticized Plaintiff publicly for failing to integrate and act upon information for which Plaintiff had been improperly deprived, and treated Plaintiff differently than other white employees. (Compl. at ¶¶ 33, 36-39.) Because the discrimination

Plaintiff alleges manifested in behavior displayed only at the workplace, as in DeWyer, it is entirely related to the work situation and arises solely from the employment relationship. The third-party attack exception, therefore, does not apply and the PWC A bars Plaintiff's claim for intentional infliction of emotional distress.

IV. Conclusion

For the foregoing reasons, Defendant's Motion to Dismiss Plaintiff's sex discrimination claim under Counts I and II of the Complaint, Plaintiff's retaliation claim under Count III of the Complaint, and Plaintiff's intentional infliction of emotional distress claim under Count III-A of the Complaint will be granted. Remaining in the case are Plaintiff's race discrimination claim under Counts I and II of the Complaint, Plaintiff's claim against Ahl for aiding and abetting employment discrimination under Count IV of the Complaint, and Plaintiff's claim against Kochman for aiding and abetting employment discrimination under Count V of the Complaint.

An appropriate Order follows.

**INTHEUNITEDSTATESDISTRICTCOURT
FORTHEEASTERNDISTRICTOFPENNSYLVANIA**

FLEMING	:	CIVIL ACTION
	:	
v.	:	
	:	NO.02-2703
KRAMONTEMPLOYER	:	
ROYCEREALTY,INC.,etal.	:	

ORDER

ANDNOW,this16th dayofAugust,2002,itisherebyORDEREDthattheDefendants'
MotiontoDismissPlaintiff'ssexdiscriminationclaimunderCountsIandIIoftheComplaint,
Plaintiff'sretaliationclaimunderCountIIIoftheComplaint,andPlaintiff'sintentionalin infliction
ofemotionaldistressclaimunderCountIII-AoftheComplaintisGRANTED.Defendantsshall
answertheremainingcountsoftheComplaintwithinten(10)days.

BYTHECOURT:

MICHAELM.BAYLSON,U.S.D.J.